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Capricious, Even Perverse Policy: Random, Suspicionless Drug Testing Policies in High Schools and the Fourth Amendment, A

Jennifer K. Turner

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A “Capricious, Even Perverse Policy”¹: Random, Suspicionless Drug Testing Policies in High Schools and the Fourth Amendment

I. INTRODUCTION

Today’s high school students must worry about more than simply writing their next paper or passing their next exam. They must also worry about passing another kind of test – a drug test. Students who fail this test may lose both their privilege to participate in extracurricular activities and their permit to park on campus.

Teenage drug use is a national problem that many think is on the rise.² A growing number of school districts across the country have responded to this apparent problem by implementing random, suspicionless drug testing (RSDT) programs. RSDT programs test particular groups of students, usually those students who participate in interscholastic athletics or extracurricular activities and sometimes those who park on campus. Most RSDT policies state that the school can refuse to allow a student to participate in extracurricular activities or park on campus if the student (or the student’s parent) refuses to consent to such testing or the student fails the test.³

In the summer of 2006, the Missouri School Board Association reported that eighteen of its member school districts either had adopted or were considering adopting RSDT programs.⁴ Three districts adopted such policies in the spring of 2006.⁵

1. *Bd. of Educ. v. Earls*, 536 U.S. 822, 843 (2002) (Ginsberg, J., dissenting).

2. See LLOYD D. JOHNSTON ET AL., U.S. DEPT. OF HEALTH AND HUMAN SERVS., NIH PUBL’N NO. 06-5882, MONITORING THE FUTURE: NATIONAL RESULTS ON ADOLESCENT DRUG USE, OVERVIEW OF KEY FINDINGS (2005), <http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf>. This survey actually reports a decline in teenage illicit drug use between the years 2001 and 2005. According to the survey, 8th-graders reporting illicit drug use in the past 30 days declined from 12 percent in 2001 to 9 percent in 2005; among 10th-graders, the same rate has dropped from 23 percent in 2001 to 17 percent in 2005; and among 12th-graders, it has dropped from 26 percent to 23 percent. *Id.* at 52. The survey defines “illicit drugs” as marijuana, cocaine, heroin, hallucinogens, amphetamines, and nonmedical use of psychotherapeutics. See generally *id.*

3. See, e.g., Branson Public School District Random Drug Testing Policy, <http://policy.msbanet.org/branson/showpolicy.php?file=IGDJB-S.BNS> (last visited May 15, 2007). Branson’s policy requires students “as a condition of participating in extracurricular activities, to consent to initial and random drug screening. In addition, consent to initial and random drug screening is required to obtain a student parking permit.” *Id.*

4. Janese Heavin, *Drug testing for students is up for debate*, COLUMBIA TRIB., Jul. 2, 2006, available at

The United States Supreme Court has upheld RSDT programs that test student-athletes⁶ as well as students who participate in competitive extracurricular activities.⁷ However, many school districts are implementing programs that are more expansive than those specifically approved by the Court. While some schools are testing students who wish to park on campus,⁸ other schools are expanding their RSDT programs by defining “extracurricular activity” very broadly. For instance, the Francis Howell School District in St. Louis has adopted an RSDT program that defines extracurricular activity as any activity “that is not offered for credit and/or a grade or is [not] a requirement for graduation.”⁹ At least one district in Kansas has used this type of broad extracurricular definition to test not only those students involved in traditional extracurricular activities, but also those who attend school dances, sporting events, or plays, thus making it possible for the district to test most of its middle and high school student populations.¹⁰

While a positive test generally has no academic or criminal consequences,¹¹ this note will argue that these expansive RSDT programs are test-

<http://archive.columbiatribune.com/2006/jul/20060702news005.asp>. Currently, the Missouri School Board Association is not recommending that its member schools adopt RSDT policies due to “privacy issues and other legal concerns.” THE EDUCATOR’S GUIDE TO HANDLING HOT SCHOOL ISSUES 127 (8th ed. 2006).

5. Heavin, *supra* note 4. These school districts are Fort Zumwalt, Branson, and Francis Howell. *Id.*

6. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

7. *See* Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

8. *See, e.g.*, Branson Public School District Random Drug Testing Policy, *supra* note 3, (requiring students to “consent to initial and random drug screening . . . to obtain a student parking permit”).

9. Francis Howell School District Random Drug Testing Policy, <http://www.fhisd.k12.mo.us/parents/boe/boardpolicy.asp?level=3&chapter=2642> (last visited May 15, 2007).

10. Eldorado Public Schools in Eldorado, KS has adopted this expansive policy. *See* Policy of Urine Drug Testing of El Dorado Unified School District Students, at 2-3, <http://www.eldoradoschools.org/parent-student/Policy%20JDDA.pdf> (last visited May 17, 2007); *see also*, *Kan. district is instituting drug test for school events*, BOSTON GLOBE, Sept. 14, 2006, available at http://www.boston.com/news/nation/articles/2006/09/14/kan_district_is_instituting_drug_test_for_school_events/.

11. *See, e.g.*, Branson Public School District Random Drug Testing Policy, *supra* note 3. Branson’s policy provides that

[s]tudents who test positive for drugs or who otherwise violate the screening process may be suspended or excluded from extracurricular activities and/or may lose the privilege to park on school property. The sanctions of this policy relate *solely* to limiting the opportunity of any student found to be in violation of this policy to participate in extracurricular activities and/or park on school property.

Id. (emphasis added). Similarly, a positive test under the RSDT policy at issue in *Board of Education v. Earls*, did not lead to “the imposition of discipline or have any

ing the wrong groups of students and draining scarce public school resources. Furthermore, the Fourth Amendment is in danger of becoming almost meaningless in public schools as those schools implementing RSDT programs move closer and closer toward testing their entire student populations.

II. LEGAL BACKGROUND

A. The Applicability of the Fourth Amendment to Public School Officials

The Fourth Amendment to the United States Constitution provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹²

Prior to the Supreme Court's decision in *New Jersey v. T.L.O.*,¹³ it was unclear whether the Fourth Amendment's prohibition on unreasonable searches and seizures applied to searches conducted by public school officials. State and federal courts that had considered the issue struggled to strike a balance between two competing interests: the privacy interests protected by the Fourth Amendment and the interests of the State in maintaining a safe and effective educational environment.¹⁴

The decisions of these courts ran from one extreme to the other. Some held that school officials were acting *in loco parentis*,¹⁵ and thus had the same immunity from the prohibitions of the Fourth Amendment as a parent would.¹⁶ At the other extreme, at least one court held that the Fourth Amend-

academic consequences." 536 U.S. at 833. Nor were the test results turned over to law enforcement officials. *Id.* "Rather, the only consequence of a failed drug test [was] to limit the student's privilege of participating in extracurricular activities." *Id.*

12. U.S. CONST. amend. IV.

13. 469 U.S. 325 (1985).

14. *Id.* at 332 n.2.

15. *In loco parentis* is defined as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

16. See, e.g., *In re Thomas G.*, 90 Cal. Rptr. 361, 364-65 (Cal. Ct. App. 1970) (citing *In re Donaldson*, 75 Cal. Rptr. 220, 221-223 (Cal. Ct. App. 1969), which held that a school official was not a public official for Fourth Amendment purposes) (holding that a search of a student's pockets did not violate the Fourth Amendment); *D.R.C. v. State*, 646 P.2d 252, 258 (Alaska Ct. App. 1982) (stating that the phrase *in loco parentis* was not that useful in the analysis because public school attendance was

ment applied in full force to public school officials.¹⁷ Students therefore had a “constitutional right to be free from warrantless searches and seizures.”¹⁸ Under this analysis, a search conducted without probable cause violated the student’s Fourth Amendment rights.¹⁹

A majority of courts passing on the Fourth Amendment issue tried to find a middle ground between these two extremes.²⁰ These courts held that the Fourth Amendment indeed applies to searches conducted by public school officials, but that the “special needs of the school environment require[d] assessment of the legality of such searches against a standard less exacting than that of probable cause.”²¹ Ultimately, these courts measured the legality of such searches against a standard of reasonableness.²² A search would be upheld if it was supported by a reasonable suspicion that it would uncover evidence that the student had violated school rules or the law.²³

In *New Jersey v. T.L.O.*, the Supreme Court agreed with the majority of courts and declared that the Fourth Amendment’s prohibition against unreasonable searches and seizures applied to public school officials.²⁴ The Court found that public school officials were state actors, and thus subject to the restraints of the Fourth Amendment.²⁵

In holding that the Fourth Amendment applies to searches by public school officials, the Court expressly rejected the argument that teachers and administrators act *in loco parentis* and are thus exempt from the dictates of

compulsory, but still analogizing the role of teachers and administrators to that of a foster parent); *R.C.M. v. State*, 660 S.W.2d 552, 554 (Tex. App. 1983) (holding that a vice principal was acting *in loco parentis*, and was thus not constrained by prohibitions of the Fourth Amendment, when he ordered a student to empty his pockets).

17. *State v. Mora*, 307 So. 2d 317, 319 (La. 1975).

18. *Id.*

19. *Id.* at 320.

20. *See, e.g.*, *Tarter v. Raybuck*, 742 F.2d 977, 981 (6th Cir. 1984); *Bilbrey v. Brown*, 738 F.2d 1462, 1466 (9th Cir. 1984); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982); *Bellnier v. Lund*, 438 F. Supp. 47, 53 (N.D.N.Y. 1977); *In re L.L.*, 280 N.W.2d 343, 350 (Wis. App. 1979).

21. *New Jersey v. T.L.O.*, 469 U.S. 325, 332 n.2 (1985).

22. *Id.* The New Jersey Supreme Court also applied a reasonableness test to the facts of *T.L.O.* when the case was before it. *In re T.L.O.* 463 A.2d 934, 941-42 (N.J. 1983). The court explained that the Fourth Amendment is not violated so long as the school official “has reasonable grounds to believe that a student possesses evidence of” activity that violates either the law or school regulations. *Id.* But the court went on to find that the search at issue was unreasonable. *Id.* at 942-43.

23. *T.L.O.*, 469 U.S. at 332 n.2.

24. *Id.* at 333.

25. *Id.* at 334. As state actors, public school officials are “subject to the limits placed on state action by the Fourteenth Amendment.” *Id.* The Fourth Amendment’s prohibition of unreasonable searches and seizures applies to state officials “by virtue of the Fourteenth Amendment.” *Id.* (citations omitted).

the Fourth Amendment.²⁶ The Court found that such an argument was inconsistent with the concept of compulsory education. According to the Court, “public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.”²⁷ Because school officials are state representatives, rather than surrogate parents, they cannot claim parental immunity from the commands of the Fourth Amendment.²⁸

Finding that the Fourth Amendment applied to school searches, the Court next addressed the question of what standard should be applied in assessing the legality of such searches.²⁹ In trying to define an applicable standard, the Court noted the need to “strike the balance between the school-child’s legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place.”³⁰ The Court found that the school environment required an easing of the typical Fourth Amendment restrictions.³¹ First, the Court held that the warrant requirement was impractical in the school environment, where swift and informal disciplinary procedures were needed.³² Beyond this, the Court found that probable cause was not necessary for such a search.³³ According to the Court, the Fourth Amendment only requires that searches and seizures be reasonable.³⁴ While probable cause may bear on the reasonableness of a search, it is not required where the public interest is better served by the lesser standard of reasonableness.³⁵ Thus, the Court held that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”³⁶

In adopting this reasonableness standard, the Court identified a two-pronged test. First, the search must have been justified at its inception.³⁷ This prong is met where there is a reasonable basis for expecting the search to turn up evidence that the student has violated school rules or the law.³⁸ Second, the search, as actually conducted, must be “reasonably related” in scope to the circumstances which justified it in the first place.³⁹ This prong is satisfied when the search measures are “reasonably related to the objectives of the

26. *Id.* at 336.

27. *Id.*

28. *Id.* at 336-37.

29. *Id.* at 337.

30. *Id.* at 340.

31. *Id.*

32. *Id.*

33. *Id.* at 341.

34. *Id.*

35. *Id.* at 340-41.

36. *Id.* at 341.

37. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)).

38. *Id.* at 341-42.

39. *Id.* at 341 (quoting *Terry*, 392 U.S. at 20).

search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”⁴⁰

Applying this analysis to the facts of *T.L.O.*, the Court upheld a school official’s search of a female student’s purse.⁴¹ A teacher caught fourteen-year-old freshman T.L.O. smoking in a school bathroom.⁴² When the vice-principal confronted her, the student denied that she had been smoking.⁴³ The vice-principal proceeded to search the student’s purse, finding not only cigarettes but also evidence of marijuana use – namely rolling papers.⁴⁴ Consequently, the vice-principal conducted a second, more thorough search of the purse.⁴⁵ This search led to the discovery of a small amount of marijuana, as well as other evidence which implicated T.L.O. in the dealing of marijuana.⁴⁶

According to the Court, the initial search was justified at its inception because of the teacher’s eyewitness report.⁴⁷ This gave the vice principal a reasonable suspicion that T.L.O. might have cigarettes in her purse.⁴⁸ Discovery of the rolling papers then gave rise to a reasonable suspicion of marijuana use, thus justifying the further inspection of T.L.O.’s purse for evidence of drug use.⁴⁹ The means employed in searching the purse were reasonably related to the objective of finding evidence of drug use.⁵⁰

B. The Fourth Amendment and Random, Suspicionless Drug Testing

Because the challenged search in *T.L.O.* was based upon individualized suspicion, the Supreme Court did not have to decide whether such suspicion was an essential element of the reasonableness standard it had adopted.⁵¹ The Court was confronted by this question in *Vernonia School District 47J v. Acton*.⁵² In *Vernonia*, the Court upheld a mandatory drug testing program which required all middle and high school students participating in interscholastic athletics to submit to random drug testing.⁵³ This policy was imposed upon all student-athletes, regardless of whether or not the student being tested was personally suspected of drug use.⁵⁴

40. *Id.* at 342.

41. *Id.* at 347-48.

42. *Id.* at 328.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 346.

48. *Id.* at 347.

49. *Id.*

50. *Id.*

51. *Id.* at 342 n.8.

52. See 515 U.S. 646 (1995).

53. *Id.* at 664-65.

54. *Id.* at 650.

While the Court concluded that school-compelled collection and testing of urine constituted a search for purposes of the Fourth Amendment, the Court quickly dispensed with the question of whether such a search required a warrant or probable cause.⁵⁵ As it did in *T.L.O.*, the Court found that the “special needs” inherent in a school setting made the warrant and probable cause requirement impractical.⁵⁶ Such requirements would “undercut ‘the substantial need of teachers and administrators for freedom to maintain order in schools.’”⁵⁷ The Court then held that the legality of a random, suspicionless search should be judged by balancing the competing interests of the school and the students.⁵⁸ Three factors must be assessed when applying this balancing test. First, a court should examine the nature and magnitude of a student’s privacy interests.⁵⁹ Second, a court should measure the intrusiveness of the search, paying careful attention to the manner in which the search was conducted.⁶⁰ Finally, a court must consider the nature and immediacy of the school’s concerns and the efficacy of the means chosen to address those concerns.⁶¹

In analyzing the first factor, the Court began by stating that the Fourth Amendment only protects against legitimate expectations of privacy and that legitimacy depends upon the factual context of the search.⁶² The Court found that students had a lesser expectation of privacy than adults because students are minors who have been committed to the school’s temporary custody.⁶³ A school’s custodial power permitted a level of supervision and control that could not be exercised over adults.⁶⁴ The Court also reasoned that students have a diminished expectation of privacy, “[p]articularly with regard to medical examinations and procedures,” because “public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases”⁶⁵

According to the Court, student-athletes have an even lower expectation of privacy. Athletes must dress and shower in communal locker rooms and submit to routine physical examinations.⁶⁶ They also voluntarily submit themselves to regulations not imposed on the student body at-large.⁶⁷ For example, Vernonia’s student athletes must acquire adequate insurance cover-

55. *Id.* at 652-53.

56. *Id.* at 653.

57. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

58. *Id.* at 652-53.

59. *Id.* at 654.

60. *Id.* at 658.

61. *Id.* at 660.

62. *Id.* at 654.

63. *Id.* at 654-55.

64. *Id.* at 655.

65. *Id.* at 656-57.

66. *Id.*

67. *Id.* at 657.

age, maintain a minimum grade point average, and comply with team rules.⁶⁸ Consequently, student athletes should expect “intrusions upon normal rights and privileges, including privacy.”⁶⁹

In measuring the intrusive nature of the testing, the Court found that the manner in which the urine sample was collected represented only a negligible intrusion on privacy.⁷⁰ Students gave the sample by going into an empty locker room with a monitor of the same sex.⁷¹ Boys gave their samples at a urinal, while fully clothed, with the monitor standing ten to fifteen feet behind the student.⁷² Girls gave their samples in an enclosed stall.⁷³ A monitor would stand outside the stall, listening for sounds of normal urination.⁷⁴ According to the Court, such testing represented an experience almost identical to that of using a public bathroom, which students used daily.⁷⁵ Furthermore, the test screened only for drugs and not for medical conditions such as pregnancy or epilepsy.⁷⁶ Finally, the test results were disclosed only to a very limited number of administrators.⁷⁷

After finding that the intrusion upon a student’s privacy was minimal, the Court went on to analyze the third factor: the nature and immediacy of the school’s concerns and the efficacy of the search in addressing them.⁷⁸ The Court described the school’s interest in deterring drug use as important, perhaps even compelling.⁷⁹ Besides the effects of drugs on the educational environment, the Court also validated the school’s concern that drug use among athletes may lead to more sports-related injuries.⁸⁰ The Court found the school’s concerns to be immediate, with evidence showing that a large and growing number of Vernonia students were using drugs and that the school was facing increased discipline problems.⁸¹ Finally, the Court held that the efficacy of Vernonia’s drug testing policy was “self-evident.”⁸² Evidence showed that the drug problem at Vernonia was “largely fueled by the ‘role

68. *Id.*

69. *Id.*

70. *Id.* at 660.

71. *Id.* at 650.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 658.

76. *Id.*

77. *Id.*

78. *Id.* at 660.

79. *Id.* at 661.

80. *Id.* at 649, 661.

81. *Id.* at 662-63. The Court does not identify which drugs were most commonly used by Vernonia students. However, it does state that the samples were routinely tested for “amphetamines, cocaine, and marijuana.” *Id.* at 650. Other drugs could be tested at the request of the school. *Id.* at 650-51.

82. *Id.* at 663.

model' effect of athlete's drug use."⁸³ Such a problem was "effectively addressed by making sure that athletes do not use drugs."⁸⁴

The Court also held that individualized suspicion was not needed.⁸⁵ An individualized suspicion requirement may prove less intrusive, but the Fourth Amendment does not require that the least intrusive means be employed.⁸⁶ The Court also pointed out that an individualized suspicion requirement would be wrought with its own difficulties.⁸⁷ Teachers may arbitrarily choose to test troublesome students, turning testing into a "badge of shame."⁸⁸ Such arbitrary testing could engender more lawsuits.⁸⁹ It also burdens teachers with the duty of spotting and reporting potential drug abuse.⁹⁰ Ultimately, the Court concluded that Vernonia's drug testing policy was reasonable and constitutional based on the student athletes' "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search."⁹¹

The Supreme Court significantly broadened its *Vernonia* holding seven years later in *Board of Education v. Earls*.⁹² *Earls* represented another Fourth Amendment challenge to a policy of random student drug testing, where a urine sample was collected and tested in a manner very similar to that used in *Vernonia*.⁹³ But unlike the *Vernonia* policy, the testing policy at issue in *Earls* applied to all students involved in competitive extracurricular activities, both athletic and non-athletic.⁹⁴ Thus, the concern over an increased risk of sports-related injuries was not present.⁹⁵

Other surprising differences also exist between the facts of *Earls* and those of *Vernonia*. While there was some evidence that drug use among students was on the rise in *Earls*, there was no evidence that those participating in extracurricular activities were more likely to be using drugs than the rest of the student body.⁹⁶ In *Vernonia*, on the other hand, there was evidence that the athletes being tested were actually at the forefront of the school's drug culture.⁹⁷ Furthermore, the *Vernonia* Court found that athletes' privacy expectations were lessened by the practices of communal undress and shower-

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 663-64.

88. *Id.*

89. *Id.*

90. *Id.* at 664.

91. *Id.* at 664-65.

92. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

93. *Id.* at 833.

94. *Id.* at 826.

95. *Id.* at 836.

96. *Id.* at 827.

97. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 649 (1995).

ing.⁹⁸ Many of the students participating in non-athletic extracurricular activities in *Earls* were not subjected to such practices.⁹⁹

In upholding the policy at issue, the *Earls* Court did not find these differences persuasive. Applying the first factor of the *Vernonia* analysis, the Court found that the students subject to testing did have a diminished expectation of privacy.¹⁰⁰ The Court noted that the *Vernonia* decision did not rest on the fact that athletes were subject to communal undress and physical examinations.¹⁰¹ Rather, the *Earls* Court declared that the *Vernonia* decision relied “upon the school’s custodial responsibility and authority.”¹⁰² The Court went on to find that students who voluntarily participate in any extracurricular activity are subject to heavier regulation than the student body at large and therefore have a diminished expectation of privacy.¹⁰³

In analyzing the nature and immediacy of the school’s concerns, the Court found that the limited evidence of an increased drug problem within the school district, coupled with the nationwide drug epidemic, was a sufficient reason to institute the policy – regardless of whether those being tested were the likely culprits.¹⁰⁴ Ultimately, the Court held that a school district need not show a pervasive or particularized drug problem before instituting suspicionless testing, explaining that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”¹⁰⁵ Additionally, “the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.”¹⁰⁶

While the Court admitted that there was a closer fit between the testing of athletes and the school’s drug problem in *Vernonia*, the Court said such a finding was not essential to the *Vernonia* decision.¹⁰⁷ A school was not required to test the group of students most likely to use drugs.¹⁰⁸ Ultimately, the *Earls* Court concluded that “testing students who participate in extracurricular activities [was] a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”¹⁰⁹ By approving a random, suspicionless drug testing policy, which was neither a response to, nor targeted toward, a specific group of problematic students, the Supreme Court significantly extended the holding in *Vernonia*.

98. *Id.* at 657.

99. *Earls*, 536 U.S. at 831.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 832.

104. *Id.* at 836.

105. *Id.* at 834.

106. *Id.* at 836.

107. *Id.* at 837-38.

108. *Id.* at 838.

109. *Id.* at 837.

III. RECENT DEVELOPMENTS

Over the past several years, many schools have expanded their random drug testing efforts, adopting policies that attempt to include as many students as possible. As discussed above, some RSDT schools are now testing students who wish to park or drive on campus. Using the *Earls* opinion as guidance, several state courts have found the inclusion of students drivers to be constitutionally permissible.

For instance, in *Joye v. Hunterdon Central Regional High School Bd. of Education*, the New Jersey Supreme Court found that student drivers have a lesser expectation of privacy than the rest of the student body.¹¹⁰ Like students participating in extracurricular activities, student drivers voluntarily subject themselves to additional school regulations.¹¹¹ Namely, student drivers must have a parking permit – a requirement not applicable to the student body at-large.¹¹² Furthermore, the court found that “students wishing to park on school grounds ask school officials to extend their supervisory authority beyond the classroom.”¹¹³ Because of student drivers, schools must maintain adequate lots, regulate traffic, and safeguard students from the risk of collision.¹¹⁴ The court held that the students’ diminished expectation of privacy, combined with testing procedures similar to those declared “unobtrusive” by the Supreme Court in *Vernonia* and *Earls*, as well as the school’s interest in keeping student drivers safe, made the testing program reasonable and thus constitutionally permissible.¹¹⁵

Similarly, in *Theodore v. Delaware Valley School District*, the Pennsylvania Supreme Court stated that it had “little doubt” that a testing policy which required all student drivers seeking a parking permit and participating in extracurricular activities to submit to random drug testing, would survive a Fourth Amendment challenge after the *Earls* decision.¹¹⁶ Although the school district made no actual showing of a specific drug problem within the school,¹¹⁷ the court pointed to language in *Earls* that indicated such a showing would be unnecessary.¹¹⁸ Nevertheless, the court declared the policy

110. 826 A.2d 624, 642 (2003).

111. *Id.*

112. *Id.*

113. *Id.* at 654.

114. *Id.*

115. *Id.*

116. 836 A.2d 76, 88 (2003).

117. *Id.* at 92.

118. *Id.* at 88. The Delaware Supreme Court specifically points to places in the *Earls* decision where the Court stated that it “had upheld random drug testing programs without any documented history of drug use,” that “student drug abuse is a ‘pressing concern’ at every school in the nation,” that “schools are permitted to take proactive measures to deter or prevent such drug use,” and that “it would be impossi-

invalid under the state constitution, finding that students are afforded more privacy rights under the Pennsylvania Constitution.¹¹⁹ Ultimately, the court held that an RSDT policy would pass Pennsylvania constitutional muster “only if the District makes some actual showing of the specific need for the policy”¹²⁰

These decisions show how much room *Earls* leaves for the expansion of RSDT programs in public high schools. Given that *Earls* requires virtually no showing of a school-wide drug problem and accords students a relatively small privacy interest (which is easily outweighed by the school’s custodial responsibilities), it is highly unlikely that any lower court will strike down an RSDT program for violating the Fourth Amendment.

IV. DISCUSSION

In both *Earls* and *Vernonia*, the Supreme Court examined the constitutionality of a particular RSDT program by balancing the students’ legitimate privacy expectations against the school’s need to maintain discipline and order. However, several public policy factors weigh in favor of protecting student privacy interests and limiting RSDT programs to those contexts already specifically approved by the Court.

A. *The Efficacy and Costs of Random, Suspicionless Drug Testing*

As Justice Ginsberg pointed out in her *Earls* dissent, policies that test students participating in athletics and other extracurricular activities target the “student population least likely to be at risk from illicit drugs and their damaging effects.”¹²¹ Justice Ginsberg pointed to studies which indicate that “students who participate in extracurricular activities are significantly less likely to develop substance abuse problem than their less-involved peers.”¹²² While the majority in *Earls* argued that schools were not constitutionally required “to test only the group of students most likely to use drugs,”¹²³ several considerations militate against testing students who are not at risk.

One such policy consideration is the expense associated with administering an RSDT program. The cost of administering one standard drug test ranges from 14-30 dollars.¹²⁴ Tests that detect steroids can cost as much as

ble to articulate a threshold level of drug use sufficient to justify a drug testing program in any event.” *Id.*

119. *Id.* at 90.

120. *Id.* at 92.

121. *Bd. of Educ. v. Earls*, 536 U.S. 822, 843 (2002).

122. *Id.* at 853.

123. *Id.* at 838.

124. Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O’Malley, *Drug Testing in Schools: Policies, Practices, and Association With Student Drug Use*, Yes Occasional Papers, Paper 2, 1 (2003),

\$100 per test.¹²⁵ The Fort Zumwalt School District near St. Louis estimates that it spends \$20,000 annually on its RSDT program.¹²⁶ It is almost cliché to speak of public schools as having limited resources. Therefore, it seems especially wasteful to spend much needed resources on programs that test those students who have a low risk of illicit drug use.

This wastefulness is magnified by research which indicates that RSDT programs have been largely ineffective in deterring teenage drug use.¹²⁷ In a study sponsored by the Institute for Social Research at the University of Michigan, researchers found “no significant differences in marijuana use or the use of other illicit drugs” by students attending schools that had implemented drug testing programs.¹²⁸ This same study also found that testing may actually increase student use of illicit drugs other than marijuana.¹²⁹ The researchers hypothesized “that testing [may] lead students to reduce their use of drugs that can be detected (like marijuana) and to displace their use onto drugs that they think less likely to be detected.”¹³⁰

Finally, schools should be wary of implementing any policy that discourages students from participating in athletic and extracurricular activities. Extracurricular participation brings with it many benefits – only one of which is a lower risk of illicit drug use. In its *amicus* brief for *Earls*, the American Academy of Pediatrics argued that “[e]mpirical research confirms that students who participate in extracurricular activities are more likely to stay in school, earn higher grades, and to set – and achieve – more ambitious educational goals.”¹³¹ Extracurricular involvement also yields another important benefit – it makes individual students more attractive applicants for admission to competitive colleges.¹³² Thus, students who choose not to participate in extracurricular activities, based on personal principles or fear of detection,

http://www.drugpolicy.org/docUploads/Johnston_sdt_study.pdf. “Standard Drug Testing” detects marijuana, tobacco, cocaine, heroin, opiates, amphetamines, barbiturates, and tranquilizers. *Id.*

125. *Id.*

126. Scott Lafee, *Steroids: to test or to educate? Several school districts find a will and a way to examine their athletes for illegal substance use*, available at <http://www.innovations.harvard.edu/news/14093.html> (June 1, 2006). Fort Zumwalt’s program also tests for steroids. *Id.*

127. See Yamaguchi, Johnston & O’Malley, *supra* note 124, at 15.

128. *Id.* See also Jared M. Hartman, *Pee-to-Park: Should Public High School Students Applying for On-Campus Parking Privileges be Required to Pass a Drug Test?*, 18 J.L. & HEALTH 229, 258 (2004) (citing another study that found health concerns were the most common reasons given by students for abstaining from drug use, not fear of detection).

129. Yamaguchi, Johnston & O’Malley, *supra* note 124, at 15.

130. *Id.*

131. Brief for American Academy of Pediatrics, et al. as Amici Curiae for Respondents at 8, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (No. 01-332), 2002 WL 206367.

132. *Id.*

will lose the substantial benefits that these activities provide. Considering the effectiveness of extracurricular activities in deterring illicit drug use (and the ineffectiveness of RSDT testing), it seems unreasonable to institute policies aimed at deterrence which may discourage student participation.

B. Laying the Foundation for Compulsory Testing of All Students

The Supreme Court has not approved random, suspicionless drug testing of all students. But the progression of the Court's decisions, from *T.L.O.* to *Earls*, seems to lay a legal foundation that would make such testing constitutionally permissible.

To be sure, the *Earls* Court noted that its approval of the RSDT program at issue relied, at least in part, on the fact that the program tested only those students who voluntarily participate in extracurricular activities.¹³³ According to the Court, such students have a diminished expectation of privacy.¹³⁴ Students who do not participate in athletics or extracurricular activities should therefore have a greater expectation of privacy than their more active counterparts. Nevertheless, given its reasoning in *Earls*, the Court could find that even this stronger privacy expectation is outweighed by the school's "important . . . perhaps compelling" interest in deterring student drug use.¹³⁵ Surely, the need to prevent the harms associated with teenage drug use applies just as strongly to inactive students as to active students. Indeed, the need may be even more urgent considering the fact that uninvolved students are at a higher risk for using illicit drugs.¹³⁶ The *Earls* decision, with its emphasis on a school's custodial responsibility, the national drug problem, and general (rather than specific) safety concerns, therefore seems to lay a legal foundation for school districts that wish to test their entire student body.¹³⁷

However, the Court should be very reluctant to approve RSDT programs that seek to test the entire student body. The Court has long held that students do not "shed their constitutional rights . . . at the schoolhouse gate."¹³⁸ Nevertheless, if the Court were to uphold a mandatory, school-wide RSDT policy, students would lose much of their Fourth Amendment right to privacy without even requiring that the government show a specific drug problem within the school.¹³⁹

133. *Earls*, 536 U.S. at 831-32.

134. *Id.*

135. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

136. In her *Earls* dissent, Justice Ginsburg pointed to a 1995 study that found tenth graders who did not participate in extracurricular activities were "'49 percent more likely to have used drugs' than those who spent 1-4 hours per week in such activities." 536 U.S. at 853.

137. *Id.* at 834-38.

138. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

139. See Ronald T. Hyman, *Constitutional Issues When Testing Students for Drug Use, A Special Exception, and Telltale Metaphors*, 35 J.L. & EDUC. 1, 24 (2006).

To ensure the continuing viability of the Fourth Amendment in public schools, the Court should require more than just evidence of a nationwide drug problem when examining the validity of an RSDT program.¹⁴⁰ It should require evidence of particularized drug problem within the school district itself. Of course, this would require rescinding the dicta in *Earls* that stated evidence of a particular problem was not “necessary to the validity of a testing regime.”¹⁴¹

A second, pedagogical concern should also make the Court hesitant to approve a school-wide RSDT policy. As the Court has noted for decades, one of the primary objectives of public schools is “educating our youth for citizenship.”¹⁴² As Justice Ginsberg states in her *Earls* dissent: “[t]hat [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”¹⁴³ Justice Ginsberg goes on to find that a school’s educational obligations require it “to ‘teach by example’ by avoiding symbolic measures that diminish constitutional protections.”¹⁴⁴ At times, these educational obligations may be overcome by “custodial obligations” which require schools to take specific actions to protect student health and safety.¹⁴⁵ However, these custodial obligations should prevail only in the face of specific safety concerns – not generalized concerns about the welfare of our nation’s schoolchildren as a whole.¹⁴⁶

V. CONCLUSION

In *T.L.O.*, the Court held that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”¹⁴⁷ However, the *Earls* Court seemed to move far away from this reasonableness standard. By testing the students who are at low risk of doing drugs in a school where evidence of a drug problem is weak at best, the Court has upheld a program that is not only unreasonable, but “capricious, even perverse.”¹⁴⁸ In doing so, the Court has tacitly encouraged school districts to

140. *Id.*

141. *Earls*, 536 U.S. at 835 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)). The Court went on to say that some showing of a particularized problem would “shore up” the assertion of a need for RSDT testing. *Id.* The Court then found that the school district had made such a showing. *Id.*

142. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

143. *Earls*, 536 U.S. at 855 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

148. *Earls*, 536 U.S. at 843 (Ginsberg, J., dissenting).

formulate incredibly expansive RSDT programs and has perhaps laid the foundation for compulsory drug testing of all students, thereby threatening the vitality of the Fourth Amendment within public schools.

JENNIFER K. TURNER